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No. 75-755

In the
Supreme Court of the United States

OCTOBER TERM, 1975

28 EAST JACKSON ENTERPRISES, INC.,
Petitioner,

vs.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and Ex-Officio Collector of Cook County,
Respondents.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, pursuant to Rule 58, respectfully prays that this Court rehear the Petition for Writ of Certiorari to the Seventh Circuit filed on November 22, 1975 and denied on January 19, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, Swygert, J. dissenting in part, has now been reported at 523 F.2d 439 (1975). The opinion of the District Court, reversed by the Seventh Circuit, has not been officially reported. It is set out in the Appendix to the original Petition.

GROUNDS FOR REHEARING

Status Of The Case

The Court of Appeals of the Seventh Circuit, relying on 28 USC §1341,[1] reversed a preliminary injunction entered by the District Court and dismissed the action. The District Court had found that petitioner's civil rights had been violated by the discriminatory tax assessment procedures in Cook County and had enjoined the Cook County Collector from selling petitioner's property for the lien of 1972 real estate taxes. The Court of Appeals held, 523 F. 2d at 442:

> We recognize that if the adequacy of a state remedy is uncertain, section 1341 does not divest the federal courts of jurisdiction. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26, 66 S.Ct. 445, 90 L.Ed. 358 (1946). But we believe that it is reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest. Under such circumstances,

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[1] § 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State. June 25, 1948, c. 646, 62 Stat. 932.

the principles of comity and restraint embodied in section 1341 require that plaintiff first seek equitable relief in the Illinois courts.

In his dissent, Judge Swygert stated: (idem)

> While I agree that principles of comity and restraint weigh heavily in favor of this court staying its hand in this case, I cannot agree that it *must* do so for lack of jurisdiction. Section 1341 does not apply when the existence or adequacy of a state remedy is in doubt or uncertain. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26, 66 S.Ct. 445, 90 L.Ed. 358 (1946). While it appears "reasonably certain" to the majority that Illinois courts will entertain a suit for injunctive relief by the appellee, this is in reality a mere prediction that certain language in very recent supreme and appellate court decisions in that state will be read broadly so as to bring appellee's claim within an exception to the general rule that taxpayers in Illinois must pay an assessed tax under protest in order to challenge the validity of the assessment. In order to reach such a result an Illinois court would have to find that 1) the assessment here is "fraudulently excessive," and 2) the Illinois remedy of payment under protest is not adequate where one cannot afford to make such payment. I do not think either finding approaches a certainty within the contemplation of section 1341.

The sole question in the case is whether or not petitioner has a plain, speedy and efficient equitable remedy in the state courts, if it does not, federal jurisdiction lies.

The Intervening Circumstances

Prior to this Court's denial of the Petition for Writ of Certiorari, petitioner filed an action in chancery in the Circuit Court of Cook County, on January 5, 1976,

praying for a preliminary and permanent injunction enjoining the respondent Collector from selling its property for the lien of 1974 taxes.[2] Therein it alleged essentially the same facts and the same grounds for relief as were raised in the suit at bar for 1972 taxes. On January 14th, petitioner moved for a preliminary injunction in the State court. On January 23rd, that Court entered an order denying the motion stating that the complaint did not state a cause of action under Illinois law and upon proper motion would be dismissed. A copy of that order is set forth in the Appendix as is a copy of the Motion for Preliminary Injunction and a copy of the temporary restraining order entered by the Chancellor to permit plaintiff time within which to seek relief in the District Court. A suit was filed in the District Court, 76 C 342, under 42 USC §1983.

The action of the State court, notwithstanding it was apprised of the Seventh Circuit's decision and of the denial of the Petition for Writ of Certiorari, renders untenable the belief of the Court of Appeals that Illinois courts would grant equitable relief to petitioner. Certainly is this so when, reviewing the case law advanced by the Chancellor, it is seen that he supports his order with the very cases relied upon by the majority in the Court of Appeals to support the opposite contention,

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[2] Immediately following the denial of its petition for rehearing in the Court of Appeals, petitioner, on October 14, 1975, filed an action in chancery in the Circuit Court of Cook County, 75 CH 6436, praying for a preliminary and permanent injunction enjoining the respondent County Collector from selling its property for the lien of 1972 taxes, the year at issue in the case at bar. Essentially the same facts were alleged therein as in the instant federal action. The state court has to date taken no action in that suit.

viz. Clarendon Associates v. *Korzen,* 56 Ill.2d 101, 107, 306 N.E.2d 299 (1973) and *Hoyne Savings and Loan Association* v. *Hare,* 60 Ill.2d 84, 322 N.E.2d 833, 836 (1974).

Petitioner has no remedy at law in Illinois courts, being unable to pay its taxes in full, including the substantial moiety illegally and unconstitutionally levied, which is a condition precedent to the only legal remedy. This the lower court found and the Court of Appeals concedes. It is now apparent it has no state equitable remedy, let alone a plain, speedy and efficient one. (Although the action of the state court is being appealed, the outcome is at best uncertain and fairly brings petitioner within the rule of *Hillsborough* v. *Cromwell,* 326 U.S. 620, 625-26 (1946). Further, Illinois has no provision for an injunction pending appeal as provided in Rule 8, Federal Rules of Appellate Procedure.) If the decision of the Court of Appeals is permitted to stand, petitioner is denied any forum whatsoever in which to seek relief for the deprivation of its federal rights of equal protection and due process occasioned by the systematic discrimination visited upon it by the taxing officials of Cook County, discrimination of long standing which severely affects tens of thousands of taxpayers and the socio-economic wellbeing of one of the principal counties of the nation. *Cf.* original petition, pp. 12-13.

Petitioner thus respectfully prays that this Court rehear this matter and issue its Writ to the Court of Appeals to review and settle the law in "this significant test case."

Respectfully submitted,

James L. Fox
Counsel for Petitioner.

Moses, Gibbons, Abramson & Fox
Of Counsel

CERTIFICATE OF COUNSEL

I certify: that the foregoing Petition is presented in good faith upon new, intervening circumstances and not for purposes of delay; that the Petition is restricted to grounds arising from such intervening circumstances.

.....

James L. Fox

APPENDIX A

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT — CHANCERY DIVISION

28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff,

v.

EDWARD J. ROSEWELL, County Treasurer and ex-officio County Collector of Cook County, Illinois,
Defendant.

No. 76 CH 14

MOTION FOR PRELIMINARY INJUNCTION

Plaintiff respectfully moves this Court for the entry of a preliminary injunction enjoining defendant, Edward J. Rosewell, Treasurer and ex-officio County Collector of Cook County, from selling plaintiff's property designated by permanent index numbers 17 15 104 020 and 021, for 1974 taxes.

In support of its Motion, plaintiff states:

1. On January 5, 1976, it filed its Complaint praying, *inter alia*, for a preliminary and permanent injunction against the defendant County Collector, enjoining him from selling plaintiff's property for 1974 real estate taxes levied thereagainst.

2. On December 4, 1975, in proceedings on the defendant Collector's Application, the Circuit Court of Cook County, County Division, entered judgment against plain-

tiff's property and all other real property in Cook County upon which 1974 taxes had not been paid; and ordered all of such property sold to satisfy the judgment thereagainst. The sale of plaintiff's property is set for January 23, 1976.

3. Real estate taxes in the amount of $81,454 were levied against plaintiff's property for 1974. The fair cash value of the property on January 1, 1974, the date for valuation purposes for real estate taxes for that year, was $950,000 as shown by the appraisal and Affidavit (attached hereto) of John Shanahan, a member of the American Institute of Real Estate Appraisers. For said year, plaintiff's property was assessed at $651,767 and equalized at $941,999.

4. Property generally in Cook County was assessed in 1974 at 20% of fair cash value while plaintiff's property was assessed at approximately 70% and equalized at 100% of fair cash value. If classification of real property for purposes of taxation was valid and in force in Cook County for 1974, property similar to plaintiff's was assessed at 32% of fair cash value. For said year, the statutes of Illinois required all property to be assessed at 50% of fair cash value if no classification was in effect. The Constitution of Illinois, Article IX, §4, required all property to be assessed uniformly or, in the alternative, uniformly within classes. The equal protection and due process provisions of Article I, §2, of the Illinois Constitution required that plaintiff's property be assessed at the same percentage of fair cash value as property generally or, in the alternative, at the same percentage as property in the same class.

5. Had plaintiff's property been assessed at 50% of fair cash value and had all other property been so

assessed, its taxes would have been $23,909. It is thus being forced to pay $57,545 of excessive and illegal taxes in violation of the aforesaid rights secured to it by the State Constitution. In the alternative, if valid classification existed in Cook County in 1974 despite the absence of statute or ordinance, plaintiff's taxes should have been $38,374, and it is being forced to pay $43,080 of excessive and illegal taxes in violation of its statutory and constitutional rights.

6. Plaintiff is without funds to pay its 1974 taxes in the full amount thereof. It is unable to borrow funds on its own credit to pay said taxes. Further, the individual officers and shareholders of plaintiff are without personal funds to loan to the Corporation to enable it to pay its taxes. *Cf.*, Affidavit of George O. Dunn, attached.

7. Plaintiff is threatened with and will suffer irreparable injury if its property is sold for taxes for the reason that the ground leases under which it occupies the premises provide for forfeiture in the event of the sale of taxes thereon. Copies of these leases are set forth in Exhibit "B" to the Affidavit of George O. Dunn filed in support of this Motion. Unless this Court enjoins defendant Rosewell from selling its property, it will be sold on January 23, 1976. Thereafter, plaintiff's only relief from the sale is by redemption. It is without funds to pay the excessive taxes let alone the additional cost of up to 24% annual interest to redeem. Further, on sale, the rights of a third party buyer of the property will have intervened and render moot any further equitable relief from this Court.

8. Plaintiff has no plain, speedy and efficient remedy at law in the courts of Illinois. Its only remedy at law is provided by §§675 and 716 of Chapter 120, Illinois

Revised Statutes, whereunder plaintiff is required to pay its taxes in full and under protest in order to bring a suit for refund in the Circuit Court of Cook County. This it was and is unable to do.

9. Sale of plaintiff's property by defendant and consequent loss of its interest therein either by forfeiture under its leases or in its inability to redeem from sale will render nugatory this Court's ability to grant any remedy whatsoever to plaintiff in the principal action.

10. Albeit the injury to plaintiff is irreparable should this Motion be denied, if it be granted there is no burden, harm or injury whatsoever to the defendant; nor is there any to the public revenues or to the public at large for the reason that the lien of 1974 taxes continues against the property together with interest thereon. The property has a fair cash value substantially in excess of the lien of said taxes which is prior to any other lien thereagainst. The amount of plaintiff's taxes is approximately only .008% of all real property taxes collected in Cook County. Accordingly, any effect on the public revenues is inconsequential.

11. Plaintiff exhausted the administrative remedies provided by statute and was summarily denied any relief whatsoever.

12. There is no meritorious defense either at law or on the facts to its principal cause of action; plaintiff states that it is patent that it will prevail thereupon.

13. It is in the public interest that the preliminary injunction issue and thereby require the assessing and taxing officials to administer the laws in accordance with constitutional mandates for plaintiff's good and that of tens of thousands of other taxpayers similarly aggrieved.

14. In support of its Motion, plaintiff appends hereto the Affidavits of George O. Dunn, its President; John E. Shanahan, appraiser, and Jean Hostetler of the State of Illinois, Department of Local Government Affairs.

Wherefore, plaintiff respectfully prays for entry of an Order thus enjoining defendant Rosewell upon such terms as this Court deems just.

28 EAST JACKSON ENTERPRISES, INC.

By .....

Its Attorneys

Moses, Gibbons, Abramson & Fox
Attorneys for plaintiff
33 North Dearborn Street
Chicago, Illinois 60602
FInancial 6-8370

* * (Caption — No. 76 CH 14) * *

ORDER DENYING PRELIMINARY INJUNCTION

This cause coming on upon plaintiff's Motion for a Preliminary Injunction, the defendant having notice thereof and being represented by counsel; and

The Court having considered the Motion, and allegations of the verified Complaint and the arguments of counsel and having been informed in the premises, finds:

FINDINGS

1. It has jurisdiction of the parties and of the subject matter.

2. The overvaluation alleged in the Complaint is not of the extent required to render the application of the

Clarendon and *Hoyne*[1] cases to this particular piece of property.

3. The allegations of inability to pay taxes do not afford a basis for equitable relief under Illinois law.

CONCLUSIONS

1. This Court concludes that as a matter of law plaintiff's Complaint does not state a cause of action under Illinois law and, upon a motion to dismiss filed against it, the Complaint would be dismissed.

2. No preliminary injunction may enter as the entry of such an injunction would be contrary to the law of this State.

ORDER

It Is Therefore Ordered that plaintiff's Motion for a preliminary injunction be denied.

Dated: Jan 23, 1976

ENTER:

/s/ Walter P. Dahl
Judge

Moses, Gibbons, Abramson & Fox
Attorneys for plaintiff
33 North Dearborn Street
Chicago, Illinois 60602
FInancial 6-8370

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[1] *Clarendon Associates* v. *Korzen*, 56 Ill.2d 95 (1974); *Hoyne Savings & Loan Association* v. *Hare*, 60 Ill.2d 84 (1974)*

* *In Hoyne, the assessment was over 4 times what it properly should have been. Here the assessment is alleged to be about 2 to 3 times the proper level. Further, Hoyne involved irregularities on the part of local officials in the giving of notice, etc., not present in the instant case. The Illinois Court noted these irregularities in affording relief for that case.* (Italics, our sub-note)

* * (Caption — No. 76 CH 14) * *

TEMPORARY RESTRAINING ORDER

This cause coming on upon plaintiff's Motion for a Preliminary Injunction and the Court having jurisdiction of the parties and subject matter, the defendant having notice thereof and being represented by counsel; and

The Court having considered the allegations of the verified Complaint and the arguments of counsel, and further having heretofore continued plaintiff's Motion in order thus to acquaint himself with the pleadings and the law of the case; and

It appearing to the Court that plaintiff's property will be sold by the defendant Collector for the lien of 1974 taxes on January 23, 1976 and if such sale occurs plaintiff will suffer irreparable injury and render it impossible for any Court to fashion relief for it; and

It further appearing that plaintiff cannot obtain injunctive relief in this Court but wishes to seek relief in the federal courts and requires a reasonable time within which to file its action therein.

It Is Therefore Ordered that the defendant County Collector be restrained from selling plaintiff's property designated as permanent index nos. 17 15 104 020 and

021 until January 30, 1976 and subject to any further order of this Court.

ENTER:

/s/ Walter P. Dahl
Judge

Jan 22 1976

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